JONES v. CHURME AND MOREIRA.

[Orig. Civ. Juris. (Taylor, J.) May 24, 1951]

[Selangor — Divorce No. 5 of 1950]

Divorce — Evidence in divorce — Application of English law — Evidence of spouse as to non-access.

In divorce proceedings admissibility of evidence bearing directly on the relief claimed is governed by the law of England and the operation of the Evidence Ordinance is, to that extent, modified.

A spouse may not give evidence of non-intercourse during the marriage to bastardise a child born in wedlock.

Russell v. **Russell**,(1) applied.

Case referred to :—

(1) *Russell v. Russell* (1924) A.C. 687.

PETITION FOR DIVORCE.

K. L. Devaser for the petitioner.

Respondent and Co-respondent in person.

Cur. Adv. Vult.

Taylor, J. : — This was a petition by a husband for dissolution of marriage on the ground of adultery between the wife and the co-respondent. It was proposed to prove the adultery by proving that the wife had borne a child at a period when the husband had no access to her. Counsel sought to question the petitioner with a view to shewing non-access by his own evidence. The Court stopped the question and called upon Counsel to shew that such evidence is admissible in this country and, at the request of Counsel, granted an adjournment to enable him to consider the matter. On the resumption, Counsel said that he could find no authority either way and did not wish to argue the point. He formally tendered the evidence and said that if the Court ruled it inadmissible he would drop the matter and seek to prove the adultery by other means.

The Divorce Enactment (Cap. 9) provides that "the Court shall act and give relief on the same principles as apply in England." If the law of evidence were materially different it might easily happen that the substantive relief sought could not be given because the necessary facts could not be proved. I am therefore, of opinion that the rule in *Russell v. Russell*(1) applies in the Federation.

I do not mean to say that the Evidence Ordinance is excluded so that all questions of admissibility arising in a divorce suit must be decided by the English law. On the contrary, I think that the Evidence Ordinance is generally applicable and that where it is required to prove a fact, such as a birth of a marriage, which might be equally material in other types of action, the evidence of such a fact must be regulated by the Evidence Ordinance. But where, as here, the fact to be proved bears directly on the basis of the divorce proceedings the admissibility of the evidence of that fact must be decided according to English law and the Evidence Ordinance is, to that extent, modified.

I would add, though my judgment is in no way dependent on this further consideration, that the reasons for the rule in the *Russell* case, as explained by Lord Dunedin at pp. 722, 725, *et seq*, apply even more strongly in this country, where many of the parties appear in person, than in England. Such evidence, and the cross-examination on it, if admitted, would very soon make it necessary to adopt the rule, either by practice or by legislation if (contrary to my view) it is not already applicable.

Order accordingly.

The Rule in *Russell v. Russell* is no longer law of England. It was abolished by section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949 which was subsequently incorporated in the Matrimonial Causes Act, 1950. (Ed. M.L.J.).

BATES v. BATES.

[Orig. Civ. Juris. (Taylor, J.) May 26, 1951]

[Selangor — Divorce Suit No. 4 of 1950]

Divorce — Evidence of change of domicil.

An immigrant husband was said to have expressed an intention to settle in Malaya. **Held** that these words did not shew an intention to settle in the State in which he then resided. **Hickson** v. **Hickson**,(1) discussed and held not to be an authority.

Cases referred to :—

(1) *Hickson v. Hickson* (1934) F.M.S.L.R. 318, (1935) F.M.S.L.R. 140; (1935) M.L.J. 265 (C.A.).

(2) *Winans v. Attorney-General* (1904) A.C. 291.

PETITION FOR DIVORCE.

K. K. Benjamin for the petitioner.

Respondent in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This is a wife's petition for dissolution of her marriage which took place in Seremban about three years ago; both parties were then in their early twenties; the husband was a non-commissioned officer in the army, stationed in Negri Sembilan and admittedly domiciled in England at that time; the bride was a locally-born girl, originally domiciled in Malacca. Some months later the husband was demobilised; he elected to take his discharge locally instead of returning to England and he obtained employment

with a tin dredging company in Selangor. The wife testifies that soon after the marriage he told her that he intended to settle in Malaya and that he had no intention of returning to England. In his answer the husband pleads that "he has settled down in Selangor and is domiciled here."

The first question is to ascertain the domicil of the parties; it is clear that the husband was originally domiciled in England; the presumption is that the domicil of origin continues until it is displaced by the acquisition of a domicil of choice and cogent evidence is necessary to establish a domicil of choice. Abandonment of intention to resume residence in the country of original domicil is not enough; there must also be a definite resolve to make the new country the home country. Further, and this is one of the great difficulties, in all Federal constitutions, with one or two statutory exceptions, the domicil must be in one particular State and cannot, as a matter of law, ever be acquired in the Federal country as a whole. In any event residence for the purposes of employment is insufficient.

On the very weak evidence in this case, which I have fully stated, I was asked to hold that the husband has acquired a domicil of choice in Selangor. It is clear that he came to reside in this State solely for the purpose of employment; he has no link whatever with Selangor, as distinct from one of the other States, except his work and he is still a very young man. There is no circumstance from which an intention to remain can be inferred. The sole evidence of his intention is what he himself has said.

I do not think that his admission on the pleadings is admissible as evidence of his intention but in any event it was obviously made for the purposes of the suit and is of no weight. The argument is that an intention to settle in Malaya coupled with residence in a State, is sufficient to show a domicil in that State. This argument is based on *Hickson v. Hickson*[1] which was decided in one sense at first instance and in the opposite sense on appeal, fifteen years ago and, as far as I can find, has not since been considered by the Court. It is necessary to examine the judgments to see exactly what was decided, and on what grounds, because it is only the *ratio decidendi* which is binding.

In that case the husband was the petitioner; he was a much older man who had spent most of his working life on a rubber estate in Selangor; in his evidence he said: — "When I have to retire, I propose to settle in this Country but I have made no plans about that." At the trial, Burton, J., held that these words implied an intention to settle somewhere in Malaya, or at the highest somewhere in the Federated Malay States (as this part of the country was then constituted) but were not definite enough to shew an *animus manendi* in Selangor. On appeal, attention was directed to the meaning of the words "in this country."

The president of the Court (Sir Samuel Thomas) said:—

> "His (the petitioner's) employment and his financial difficulties . . . do not conflict with his statement that he intends to remain in the State of Selangor."

This is a total mis-statement of the evidence; the whole point of the case was that the petitioner never had said that he intended to remain in Selangor. The Chief Justice went on to quote the statement actually made and to suggest that when the petitioner used the words: — "settle in this country" he meant Selangor. In support of this suggestion the Chief Justice gave a variety of reasons which in reality are not reasons why the word "country" in that context might have meant "State" but possible reasons why a man might decide to live in Selangor. With all possible respect to the Chief Justice I must say that in my opinion this is a remarkable example of begging the question.

He gives an additional reason — namely, that the petitioner's evidence had not been controverted by "the other two interested parties;" this also is a mis-statement of the facts; the respondent was living with the co-respondent; they did not appear and had no interest in controverting anything that the petitioner might say; they could not obtain a divorce at the wife's instance. Manifestly their only interest in the suit was to let it go undefended. The question was whether the petitioner had discharged the burden, which was on him, of proving a domicil of choice in Selangor, and this burden is a heavy one — *Winans v. Attorney-General*[2].

Mr. Justice Whitley said that in his opinion when the petitioner said "in this country" he was referring to the particular State in which he lived and not to the country as a whole, meaning Malaya, or to the Federation (then of four States). With the greatest possible respect to the learned Judge I must say that in my opinion, as a matter of plain English, the words simply will not bear the meaning which he put on them. It really comes to this — to take the case of the learned Judge himself — he lived for several years in Penang — if one of his friends invited him to lunch the following day and he said: — "I am sorry I cannot accept but I am leaving the country" — can anyone doubt that the friend would have taken him to mean

that he was going on furlough to Europe or some other country altogether outside Malaya? As a matter of ordinary speech could anyone possibly have thought that what he really meant was that he was merely going to Parit Buntar to play cricket and would be back in Penang in the evening? His judgment is founded on his view of the meaning of ordinary words, which is a finding of pure fact and not binding on a subsequent Court.

The judgment of Howes, J., is different; he commences by concurring with the Chief Justice; then he makes some observations on the law and the facts and states his conclusion thus. "The circumstances of this case strongly support his declared intention of remaining in Selangor permanently." But the petitioner never had declared that intention. The judgment contains no decision whatever on the point litigated in the appeal — still less any *ratio decidendi.*

The case of *Hickson* therefore, in the Court of Appeal, came to this. The petitioner said that he proposed to settle in this country; the Chief Justice said the words "this country" meant Selangor because Selangor might be an agreeable place of residence for the petitioner. Whitley, J., said that the words, in that context, meant the particular State in which the speaker then resided. Howes, J., ignored the whole argument and founded himself on a declaration which had never been made. Clearly, there is no decision which another Court would be required to follow.

In the case before me the only evidence of the husband's intention is a bare statement by the wife, who is the petitioner and a vitally interested witness, that on one occasion, about three years ago, he stated orally, in what context does not appear, that he "intended to settle in Malaya." This evidence is not sufficient to discharge the burden of proof of intention. In any event the words used, even if they were clearly proved, do not show an intention to settle in the particular State.

I fully appreciate the difficulty with which the petitioner is faced but it always must be difficult to prove an allegation which is, in the nature of things, highly improbable. When a young man, of any race, leaves his home country — whether in Europe or Asia — and comes to Malaya to seek his fortune, then obviously he is willing to go to any State or Settlement where he can find a suitable opening. He may, in the course of time, become attached to a particular place in such a way as to raise an inference that he has settled there but meantime he retains his domicil of origin, like every other immigrant.

However, in order to save the parties the expense of a further trial in the event of my view on this question not prevailing, I will deal shortly with the merits of the petition.

In July last the wife went to Seremban for a few days to visit her mother; on her return she noticed a smear of lipstick on a tea-cup; this made her suspicious; she questioned a servant who told her that a Chinese woman had been in the house during her absence; on this she quarrelled with her husband and the very next day she left the matrimonial home and returned to her mother; shortly afterwards, this action was started. The only witness called for the petitioner was an Indian Tamil gardener who was also employed as a water-carrier in the house and he said that in the early morning of the day on which the wife returned from the visit he saw the husband on the bed with a Chinese woman. The witness was carrying water to the bathroom, as he says in the ordinary routine, and the door between the bathroom and bedroom had been left open; he says that he did not see any mosquito net, that he did not see the woman's face, that he never saw her on any other occasion either before or after that incident, and he remarked that no other person would have been admitted to the house. It is obviously very difficult to reconcile the last two statements. All the Judges who have ever had to deal with questions of this sort have commented on the extremely unreliable character of the evidence of scullions and chambermaids regarding the personal relations of their employers. Further, this witness is still working for the husband who is the respondent to the petition. The evidence is insufficient to establish adultery.

It is necessary, in order to succeed, for the petitioner to support her plea that there is no collusion or connivance between herself and the respondent. She has failed to establish either point; even allowing for the difficulty of supporting a negative proposition, the circumstances which I have mentioned are very strongly suggestive of collusion and also of connivance. I do not suggest that the wife connived in the adultery (if it occurred) but the evidence suggests that the husband colluded and connived in the petition.

In my view, therefore, the petition fails on all grounds and must be dismissed.

Petition dismissed.